No. 540

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States.

OCTOBER TERM, 1949.

THE BLANCHARD MACHINE COMPANY,
Petitioner,

v.

RECONSTRUCTION FINANCE CORPORATION
PRICE ADJUSTMENT BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

AND

BRIEF IN SUPPORT THEREOF.

FRANK B. WALLIS,
Attorney for petitioner.

Of Counsel:
GOODWIN PROCTER & HOAR,
HARRIS A. REYNOLDS.

ANDERSON G. GRISCHELL & SON, LAW PRINTERS, BOSTON.

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v.
RECONSTRUCTION FINANCE CORPORATION
PRICE ADJUSTMENT BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, The Blanchard Machine Company, prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the District of Columbia entered in case File No. 9925 in said Circuit Court on October 17, 1949, affirming the order and decision of the Tax Court of the United States entered for the respondent on March 19, 1948, in case File No. 208R in said Tax Court.

Opinions Below.

The Tax Court filed a memorandum opinion on March 18, 1948, which is printed in the record (R. pp. 175-177). The opinion of the Court of Appeals was filed October 17,

1949, and is printed in the record (R. pp. 188-191). Neither opinion has yet been reported.

Basis of Jurisdiction.

Jurisdiction is invoked under Title 28, United States Code, §§ 1254 and 2101.

Statement of Matter Involved.

The general matter involved is the construction and constitutionality of the 1942 Renegotiation Act (Act of April 28, 1942, c. 247, Title IV, § 403, 56 Stat. 245, 50 U.S.C. App. § 1191) and amendments thereto, particularly as amended July 1, 1943, by the Military Appropriation Act of 1944 (c. 185, 57 Stat. 348), with respect to excessive profits realized by the petitioner from sales made by it indirectly to Defense Plant Corporation during petitioner's fiscal year ended November 30, 1942, under contracts which were completed and paid for prior to July 1, 1943. Pertinent provisions of the Renegotiation Act and amendments thereto are printed in appendix A hereof.

All pertinent facts involved in this case were stipulated by the parties (R. pp. 77-174).

During its fiscal year ended November 30, 1942, petitioner made sales of its machines aggregating $2,003,254.29 indirectly to Defense Plant Corporation, a subsidiary of Reconstruction Finance Corporation, and of such sales $1,661,803.78 were attributable to contracts completed and paid for within said fiscal year, and $341,450.51 were attributable to contracts not paid for within said fiscal year, but completed and paid for prior to July 1, 1943. These sales were made on purchase orders which contained no provision for adjustment of price or for renegotiation (R. pp. 77, 78, 81).

On February 28, 1945, the respondent issued an order (R. pp. 44-46) which embodied a unilateral determination of excessive profits for petitioner's fiscal year ended November 30, 1942, in the sum of $362,098. Said sum of $362,098, after allowance of a tax credit of $275,278, was collected by the United States over the protest of the petitioner by withholding payments on other contracts of petitioner (R. p. 80). The amount of the excessive profits is not in dispute.

The original 1942 Renegotiation Act (Act of April 28, 1942, c. 247, Title IV, § 403(a), 56 Stat. 245, 50 U.S.C. App. § 1191) made renegotiable contracts and subcontracts with the War Department, the Navy Department and the Maritime Commission, provided that final payment pursuant to such contracts or subcontracts had not been made prior to date of enactment. Not until July 1, 1943, were contracts and subcontracts with Defense Plant Corporation made renegotiable (Military Appropriation Act of 1944, c. 185, 57 Stat. 348). Prior to that date all of petitioner's contracts for indirect sales to Defense Plant Corporation for its fiscal year ended November 30, 1942, had been completed and paid for.

Petitioner contends that the July 1, 1943, amendment is not applicable retroactively to the petitioner's contracts which were fully completed and paid for prior to its enactment, because the amendment is not by its express terms retroactive, and because it was not the intent of Congress to give the amendment retroactive effect, as is borne out by the only legislative history of the amendment which can properly be considered in determining congressional intent. Petitioner further contends that such retroactive application of the July 1, 1943, amendment would be unconstitutional as a violation of the Fifth Amendment to the United States Constitution.

The October 21, 1942, amendment to section 403(c) of the 1942 Renegotiation Act [c. 619, Title VIII, § 801(a-c), 56 Stat. 982] provided that no renegotiation of the contract price should be commenced more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract occurred [§ 403(c)(6)].

Whether respondent commenced renegotiation of petitioner's contracts which were completed and paid for during its fiscal year ended November 30, 1942 (and which amounted to $1,661,803.78 of petitioner's total sales to Defense Plant Corporation), within the time prescribed by section 403(c)(6) of the Renegotiation Act of 1942, as amended, depends upon judicial interpretation of the words "renegotiation commenced" as used in the statute and as applied to the undisputed events which took place prior to November 30, 1943.

The only events taking place prior to November 30, 1943, relating to commencement of renegotiation, consisted of a letter dated October 25, 1943, sent by the respondent informing the petitioner that its business with subsidiaries of Reconstruction Finance Corporation was subject to renegotiation, that renegotiation proceedings were necessary, and seeking information from petitioner concerning its said business. The letter was followed by an informal interview between petitioner and representatives of respondent who informed petitioner that they had been ordered to start renegotiation proceedings and requested the requisite data. Subsequently a letter dated November 23, 1943, was sent by respondent to petitioner stating that respondent had received the report of its representatives as to the interview held with petitioner's assistant manager "for the purpose of starting renegotiation of your contracts and sub-contracts with R.F.C. subsidiaries," and advising that "as soon as convenient we will continue the

assignment covering the renegotiation of your contracts and sub-contracts with the R.F.C. subsidiaries" (R. pp. 86, 78, 79, 89).

Petitioner did not waive any requirement for the commencement of renegotiation (R. p. 79), and contends that, upon a proper interpretation of said section 403(c)(6), renegotiation was not commenced within the time allowed by said section. After the order of the respondent was issued on February 28, 1945, determining petitioner's excessive profits for the fiscal year ended November 30, 1942, to be $362,098, petitioner duly filed in the Tax Court a petition (R. p. 3 *et seq.*) which raised the substantial questions of statutory construction and constitutionality involved herein.

After hearing, the Tax Court on March 18, 1948, ordered and decided adversely to petitioner's contentions. Thereafter petitioner timely brought the case to the Court of Appeals for the District of Columbia by Petition for Review (R. pp. 179-184) filed with the Tax Court pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code. The Court of Appeals affirmed the decision of the Tax Court on October 17, 1949.

Questions Presented.

1. Whether the Court of Appeals erred in holding that the amendment of section 403 of the Renegotiation Act, embodied in the Military Appropriation Act of 1944, enacted on July 1, 1943, is to be interpreted to apply to, or to subject to renegotiation, petitioner's contracts or subcontracts with Defense Plant Corporation which were completed and paid for prior to enactment of said amendment.

2. Whether the Court of Appeals erred in holding that the amendment of section 403 of the Renegotiation Act, embodied in the Military Appropriation Act of 1944, en-

acted on July 1, 1943, as applied retroactively to petitioner's contracts or subcontracts with Defense Plant Corporation, which were completed and paid for prior to enactment of said amendment, is constitutional.

3. Whether the Court of Appeals erred in holding that the renegotiation of petitioner's contracts which had been completed and paid for within its fiscal year ended November 30, 1942, was commenced within the time allowed by section 403(c)(6) of the Renegotiation Act, as amended.

Reasons for Granting the Writ.

The United States Court of Appeals for the District of Columbia has decided two questions of substance relating to construction of the 1942 Renegotiation Act, as amended, and a question of constitutionality of the July 1, 1943, amendment in its retroactive application to contracts completed and paid for prior to July 1, 1943.

1. This Court has not decided these questions, which are of general importance, and they ought to be decided.

a. There are numerous cases pending in the several circuits which involve the same questions and which will be finally determined or settled by a decision of this Court in this case, thus avoiding protracted and expensive litigation.

b. Renegotiation has become an established national policy, not only in time of war but also in time of peace with respect to certain types of government procurement. See, for example, Renegotiation Act of 1948 (May 21, 1948, c. 333, § 3, 62 Stat. 259) and Act of June 25, 1948 (c. 658, § 401, Title IV, 62 Stat. 1049). A decision by this Court as to whether Congress can subject to renegotiation contracts fully completed and paid for prior to any congressional enactment will affect not only this petitioner but a mass

of other persons dealing with the government, who are presently or prospectively litigants in the courts of the United States. A decision on this question is also extremely important as a guide for future congressional action in clearly defining the constitutional limitations with respect to renegotiation or similar legislation.

2. The questions of construction and constitutionality raised herein are questions of substance.

a. The Court of Appeals has decided that the amendment of section 403 of the Renegotiation Act, embodied in the Military Appropriation Act of 1944, enacted on July 1, 1943, should be construed to apply retroactively to petitioner's contracts or subcontracts with Defense Plant Corporation, even though said contracts or subcontracts were in fact completed and paid for prior to July 1, 1943. The Court of Appeals held that it was the intent of Congress that the said amendment be applied retroactively and that the legislative history of the act confirms such intent.

The question is one of substance, because the July 1, 1943, amendment does not expressly provide for retroactive application to petitioner's past contracts and subcontracts with Defense Plant Corporation in such clear, strong and imperative language as would be necessary to overcome the presumption in favor of prospective operation.

United States v. *Heth,* 3 Cranch, 399, 413 (U.S. 1806).

Claridge Apartments Co. v. *Commissioner,* 323 U.S. 141, 164 (1944).

Brewster v. *Gage,* 280 U.S. 327, 337 (1930).

Hassett v. *Welch,* 303 U.S. 303, 314 (1938).

United States v. *Magnolia Petroleum Co.,* 276 U.S. 160, 162 (1928).

This rule was laid down in *United States* v. *Heth, supra,* and has been followed ever since. In that case the Court said at page 413:

> "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services, and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

That part of the legislative history of the act which can properly be considered strongly indicates that Congress did not intend retroactive application of the July 1, 1943, amendment, at least to contracts theretofore completed and paid for. Representative Case, who introduced both the original Renegotiation Act and the July 1, 1943, amendment into Congress, expressed the doubt in both instances that Congress had the constitutional power to make retroactive provisions applicable to contracts completed and paid for prior to date of statutory enactment (88th Cong. Rec. 3137; 89th Cong. Rec. 6176). The Conference Report made by the Joint Committee of the House and Senate on the Military Appropriation Bill, 1944, containing the July 1, 1943, amendment to the Renegotiation Act, expressly agreed and recommended that the provisions of the bill should be effective "from and including 1943" (House Report No. 620, 89 Cong. Rec. 6867-6868, at p. 6868).

Furthermore, the question is one of substance because the retroactive application of the July 1, 1943, amendment

to the Renegotiation Act raises a grave constitutional issue under the Fifth Amendment to the Constitution. This Court has always adhered to the long-established rule of statutory construction of avoiding possible unconstitutional interpretations wherever possible.

United States v. *Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909).

Crowell v. *Benson*, 285 U.S. 22, 62 (1932).

Cf. *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168, 173 (1942).

b. The Court of Appeals held that renegotiation of petitioner's subcontracts with Defense Plant Corporation was commenced within the time provided for in the Renegotiation Act as amended, namely, before November 30, 1943; and the Court adverted to the fact that the Tax Court had reached the same conclusion in accordance with its previous decision in *Spray Cotton Mills* v. *Secretary of War*, 9 T.C. 824 (1947).

In *Spray Cotton Mills* v. *Secretary of War, supra*, a majority of the Court construed the words "renegotiation commenced" as used in section 403(c)(6) of the act to mean the taking of "the first step or act which set the machinery of renegotiation in motion," such as the mailing of a letter requesting financial information from the contractor. But section 403(c)(5), enacted at the same time as section 403(c)(6) and applicable to contractors who voluntarily furnished information to the governmental department, likewise uses the words "renegotiation commenced" and contains a definition thereof contrary to the interpretation in the Spray case.

It is to be noted that three judges in the Tax Court dissented in the Spray case and the dissenting opinion supports petitioner's contention.

c. The United States Court of Appeals for the District of Columbia has decided a question of substance relating to the construction and application of the Fifth Amendment to the Constitution.

The Court of Appeals held that the Renegotiation Act of 1942 as amended by the Military Appropriation Act of 1944 on July 1, 1943, was constitutional in its retroactive application to petitioner's subcontracts that had been completed and paid for prior to July 1, 1943.

The 1942 Renegotiation Act has been held constitutional by this Court in its application to contracts which had already been entered into but were still executory by April 28, 1942, the date of enactment of the original Renegotiation Act.

Lichter v. *United States,* 334 U.S. 742 (1948).

But the decision in the Lichter case was carefully confined to prospective operation of the Renegotiation Act. The Court said at page 789 that—

> ". . . *if uncompleted to the extent that the final payment has not yet been made,* the recovery of excessive profits derived from [a war contract] may be authorized as has been done here." (Italics supplied.)

In the case at bar, petitioner's subcontracts with Defense Plant Corporation had been completed and paid for prior to July 1, 1943, and the proceeds from such contracts had become part of petitioner's general property. Consequently there exists a substantial constitutional question, whether the retroactive application of the July 1, 1943, amendment to petitioner's contracts which had been fully performed and paid for prior to July 1, 1943, does not deprive petitioner of its property without just compensation

and without due process of law, contrary to the Fifth Amendment.

The Court of Appeals in its opinion cited *Howell Electric Motors Co.* v. *United States,* 172 F. (2d) 953 (1949), in which the Court of Appeals for the Sixth Circuit held that the July 1, 1943, amendment to the Renegotiation Act could constitutionally be given retroactive application to the contractor's war contracts with subsidiaries of Reconstruction Finance Corporation which had been completed and final payment had been made during the period April 28, 1942, to December 31, 1942. The only United States Supreme Court cases cited on the point in the Howell case were *Louisville & Nashville R.R. Co.* v. *Mottley,* 219 U.S. 467 (1911) (which is distinguishable because the obligation of payment under the contract in question had not been completed upon the date of the statutory enactment) and *Welch* v. *Henry,* 305 U.S. 134 (1938), and *United States* v. *Hudson,* 299 U.S. 498 (1937), both of which cases involved income tax legislation. Retroactive application of income tax statutes for relatively short periods of time is constitutional because, at least where an income tax is already in effect, Congress has power to impose an increased or additional tax if satisfied there is need therefor.

United States v. *Hudson, supra,* at page 500.

Furthermore, the Renegotiation Act is not a tax statute. Congress specifically rejected proposals to authorize renegotiation by means of a taxing statute (see, for example, remarks of Senator Taft, 88th Cong. Rec. 3660, and 89th Cong. Rec. 6081). And section 3 of the Joint Statement issued by the War, Navy and Treasury Departments and the Maritime Commission on March 31, 1943, relative to the Renegotiation Act, is entitled: "Section 403 is not a tax act . . ."

Thus petitioner presents questions of substance and of general importance, which have not been, but should be, decided by this Court.

Petitioner therefore respectfully submits that the requested writ should issue to the United States Court of Appeals for the District of Columbia directing that Court to certify and send to this Court a full and complete transcript of the record in the case therein entitled "The Blanchard Machine Company, Petitioner, Appellant, *v.* Reconstruction Finance Corporation Price Adjustment Board, Respondent, Appellee," Docket No. 9925, to the end that the said judgment and decree of said Court entered October 17, 1949, may be reviewed by this Court, and that your petitioner may have such other relief as this Court deems appropriate.

FRANK B. WALLIS,
Attorney for BLANCHARD MACHINE COMPANY, *Petitioner*,
84 State Street,
Boston 9, Massachusetts.

Of Counsel:
GOODWIN, PROCTER & HOAR,
HARRIS A. REYNOLDS,
84 State Street
Boston 9, Massachusetts.

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OCTOBER TERM, 1949.

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v.
RECONSTRUCTION FINANCE CORPORATION
PRICE ADJUSTMENT BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The memorandum opinion of the Tax Court relating to the issues presented by this petition is to be found in the Record at pages 175-177, but has not been reported.

The opinion of the Circuit Court of Appeals for the District of Columbia affirming the judgment of the Tax Court is to be found in the Record at pages 188-191, but has not yet been reported.

Basis of Jurisdiction.

The judgment of the Circuit Court of Appeals for the District of Columbia affirming the Tax Court's decision was entered October 17, 1949 (R. p. 188).

The jurisdiction of this Court is invoked under Title 28, United States Code, §§ 1254 and 2101.

Statement of the Case.

The facts, having been stipulated (R. pp. 77-174), are not in dispute. A summary of the facts pertinent to the issues herein involved have been set forth in the petition herewith.

Specification of Errors.

It is submitted that the Court of Appeals erred—

1. In ruling that the amendment of section 403 of the Renegotiation Act, embodied in the Military Appropriation Act of July 1, 1943, is to be interpreted as applying to or subjecting to renegotiation petitioner's contracts or subcontracts with Defense Plant Corporation which were completed and paid for prior to the enactment of said amendment.

2. In ruling that the amendment of section 403 of the Renegotiation Act, embodied in the Military Appropriation Act of July 1, 1943, as applied retroactively to petitioner's contracts or subcontracts with Defense Plant Corporation, which were completed and paid for prior to enactment of said amendment, is constitutional.

3. In ruling that the renegotiation of petitioner's contracts, which had been completed and paid for within its fiscal year ended November 30, 1942, was commenced within the time allowed by section 403(c)(6) of the Renegotiation Act as amended.

Statutes Involved.

The pertinent provisions of the statutes involved are set forth in appendix A.

Summary of Argument.

The July 1, 1943, amendment to the Renegotiation Act (c. 185, § 1, 57 Stat. 348), although it made contracts and subcontracts with Defense Plant Corporation subject to renegotiation, did not apply retroactively to the petitioner's subcontracts with Defense Plant Corporation which were completed and paid for prior to July 1, 1943. Congress did not intend such retroactive effect, for in the 1942 Renegotiation Act (Act of April 28, 1942, c. 247, Title IV, § 403(c), 56 Stat. 245) it specifically excluded contracts and subcontracts which were completed and paid for prior to the date of enactment, because of its conviction, disclosed by the legislative history of the act, that such contracts and subcontracts could not be constitutionally renegotiated. Furthermore, the July 1, 1943, amendment (c. 185, 57 Stat. 348) did not purport by its terms to apply to contracts and subcontracts which were completed and paid for prior to its enactment, whereas, in the other amendments to the same act, whenever any provision was intended to be applicable as of a date prior to its enactment, the effective date was invariably spelled out.

The July 1, 1943, amendment is inapplicable to the petitioner's contracts and subcontracts with Defense Plant Corporation which were previously completed and paid for, not only because Congress so intended, but because the contrary interpretation would be unconstitutional. The petitioner does not attack the constitutionality of the Renegotiation Act as such. It recognizes the power of Congress to regulate profits made on existing and prospective war-production contracts. However, war does not repeal the Constitution. The retroactive recapture, under color of the July 1, 1943, amendment (c. 185, 57 Stat. 348), of the profits made by the petitioner on contracts which were no longer in existence, having been completed and paid for

prior to July 1, 1943, is a violation of the due process and just compensation clauses of the Fifth Amendment.

Renegotiation was not commenced within the time required by section 403(c)(6) of the Renegotiation Act, as amended. The meaning of "renegotiation commenced" as used in section 403(c)(6) is defined by section 403(c)(5), and under this definition the events which took place prior to November 30, 1943, did not constitute the commencement of renegotiation.

Argument.

I. PETITIONER'S SUBCONTRACTS WITH DEFENSE PLANT CORPORATION, WHICH WERE COMPLETED AND PAID FOR PRIOR TO JULY 1, 1943, WERE NOT SUBJECT TO RENEGOTIATION UNDER THE RENEGOTIATION ACT, EITHER AS IT WAS ORIGINALLY ENACTED OR AS IT WAS SUBSEQUENTLY AMENDED.

A. Prior to the amendment of July 1, 1943, contracts and subcontracts with Defense Plant Corporation were not subject to renegotiation.

Although Defense Plant Corporation had been in existence for nearly two years (R. p. 83), and was in full-scale operation, the 1942 Renegotiation Act, enacted on April 28, 1942, was specifically restricted to contracts and subcontracts with the War and Navy Departments and the Maritime Commission under section 403(a); and this section was expanded to include the Treasury Department by amendment on October 21, 1942 (c. 619, Title VIII, § 801a, 56 Stat. 982).

It was not until the passage of the Military Appropriation Act of 1944 on July 1, 1943, that Congress amended the Renegotiation Act to make subject to renegotiation contracts and subcontracts with Defense Plant Corporation.

B. The July 1, 1943, amendment to the Renegotiation Act, making contracts and subcontracts with Defense Plant Corporation and other Reconstruction Finance Corporation subsidiaries subject to renegotiation, should not be applied retroactively to the petitioner's subcontracts with Defense Plant Corporation, which were completed and paid for prior to July 1, 1943.

The United States Supreme Court has long refused to give retroactive effect to statutes unless the legislative intent to give them such effect is expressed in clear, strong and imperative language. Retroactivity is not favored except upon the clearest mandate.

Claridge Apartments Co. v. *Commissioner*, 323 U.S. 141, 164 (1944).
United States v. *Magnolia Petroleum Co.*, 276 U.S. 160, 162 (1928).
Hassett v. *Welch*, 303 U.S. 303, 314 (1938).
Brewster v. *Gage*, 280 U.S. 327, 337 (1930).
United States v. *St. Louis, San Francisco & Texas Ry. Co.*, 270 U.S. 1 (1926).

(See excerpts from cases on this point, printed in appendix B (pp. 45-48 hereof).

Under this well-settled principle, the July 1, 1943, amendment should not be given retroactive effect to petitioner's contracts and subcontracts with Defense Plant Corporation, which were completed and paid for prior to July 1, 1943, since the legislative history is completely devoid of any evidence of intent to make the amendment applicable to contracts completed prior to its enactment. A brief reference to the legislative history is appropriate.

On May 26, 1943, the War Department subcommittee of the House Committee on Appropriations commenced public hearings on the 1944 military budget. Appropriations

of approximately $59,000,000,000 were requested; and heads of various subdivisions of the War Department testified concerning appropriations for their particular work. Most of the witnesses were asked general questions about renegotiation of contracts within their jurisdictions (Hearings, 483-518 and 549-589). Later, on June 18, 1943, the Military Appropriations Bill (H.R. 2996) was reported to the House without any renegotiation provision, with the accompanying committee report containing only a brief general reference to renegotiation (Report No. 566, 89th Cong. Rec. 6185).

In the course of discussion of the Bill on the floor of the House, Representative Case offered an amendment which would amend the act to make Defense Plant Corporation and Defense Supplies Corporation "Departments," which was adopted by the House on June 19, 1943 (89th Cong. Rec. 6176). The Bill as thus amended was passed by the House on June 21, 1943. On the following day, H.R. 2996 was referred by the Senate to a subcommittee of the Committee on Appropriations, which on June 23, 24 and 25, 1943, held hearings. There was no discussion whatsoever at these hearings relative to renegotiation of Defense Plant Corporation contracts.

The Senate Committee on Appropriations reported the Bill, on June 25, 1943 (Report No. 357, 89th Cong. Rec. 6458), recommending that the House amendment relative to Defense Plant Corporation renegotiation be stricken. Next day the Senate considered the Bill, and struck therefrom that House amendment relative to Defense Plant Corporation renegotiation (89th Cong. Rec. 6668).

Thereafter, on June 29, 1943, the Senate further considered and finally passed the Bill. Conferees from both Houses were appointed: as the new fiscal year was about to begin, the Conference Report was submitted to both Houses on June 30, 1943, without delay (H.R. 617, 89th

Cong. Rec. 6829; *ibid.* 6868). The bill as agreed upon in conference contained the renegotiation amendment finally enacted.[1]

Section 1 of the Military Appropriation Act of 1944 (Public Law 108, 78th Cong. 1st Sess.), containing the aforesaid July 1, 1943, amendment, included more than twenty-two printed pages, dealing largely with specific appropriations. Its relevant portions are:

> ". . . the following sums are appropriated . . . for the Military Establishment for the fiscal year ended June 30, 1943 . . .
>
> "Expediting production of equipment and supplies for national defense . . . 657,011,000: *Provided,* That

[1] Meantime, it should be noted, when the Senate was considering H.R. 2996 on June 29, 1943, Senator Thomas (who had charge of the Bill in the Senate) said (89th Cong. Rec. 6829):

> "Today is the 29th of June. Tomorrow will be the last day of this fiscal year. The bill carries some amendments which may not be agreed to in conference, and it may not be finally acted upon prior to the end of this fiscal year. In order that the bill may carry a section which will make it retroactive to July 1, and take care of the time intervening between July 1 and the date of its final approval, I offer an amendment which I sent to the desk. It is the same provision which such bills ordinarily carry to provide for the time intervening between the beginning of the new fiscal year and the date when the bill is finally approved."

The amendment which he offered for adoption (and which was included verbatim in the Bill as enacted) read as follows:

> "The appropriations and authority with respect to appropriations contained herein shall be available from and including July 1, 1943 for the purposes respectively provided in such appropriations and authority."

In referring to this Senate amendment the Report of the House Managers said (89th Cong. Rec. 6967):

> "Makes the provisions and appropriations in the bill effective from and including July 1, 1943, as proposed by the Senate."

expenditures from any appropriation under this heading may be made without securing the specific approval of the projects by the President: *Provided further,* That clauses (1) and (2) of subsection (a) of section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, are amended to read as follows: . . .

"Sec. 403. (a) For the purposes of this section—

"1. The term 'Department' means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

"2. In the case of the Maritime Commission, the term 'Secretary' means the Chairman of such Commission, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term 'Secretary' means the board of directors of the appropriate corporation.

"Provided further, that section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, [The 1942 Renegotiation Act] as amended, is further amended by adding at the end thereof the following subsection:

"(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company."

Section 22 of the Military Appropriation Act also provided:

"The appropriations and authority with respect to appropriations contained herein shall be available

from and including July 1, 1943, for the purposes respectively provided in such appropriations and authority. . . ."

There was no discussion of the Conference Report in the Senate; nor did the Report itself in any way explain the proposed amendment to the Renegotiation Act. Likewise in the House there was no consideration of the amendment, even though the House Managers submitted a written Report (89th Cong. Rec. 6867), stating with respect to the Defense Plant Corporation amendment:

> "Amendment No. 1: Restores the provision proposed by the House, including the Defense Plant Corporation and the Defense Supplies Corporation within the provisions of the law relative to the renegotiation of contracts, amended to include the Metals Reserve Company and the Rubber Reserve Company."

Thus no deliberation whatsoever occurred in either House, nor (so far as committee reports reveal) before any committee of either House as to the possibility that the proposed amendment to the renegotiation law might have a retroactive effect. Furthermore, no conference report disclosed that there was the remotest chance of such a contention later being raised. In short, the text of the measure finally considered by Congress nowhere said specifically that the new amendment broadening the renegotiation jurisdiction was to affect settled transactions.

The only reference to the *effective date* contained in the Bill read that the "appropriations and authority with respect to appropriations . . . shall be effective from and including July 1, 1943." In the House, the report of its Managers had explained that section 22 "makes the *provisions* and appropriations in the bill effective from and including July 1, 1943, as proposed by the Senate."

It is accordingly true here that the July 1, 1943, amendment was prospective in every sense. ". . . to hold otherwise would be a strained construction, and violate a general rule of jurisprudence, to wit, that it is of the very essence of a new law that it shall apply to future cases, and such must be its construction, unless the contrary clearly appears." *McEwen* v. *Den*, 24 How. (U.S.) 242, 244 (1861). The new legislation cannot, therefore, "affect contracts entered into prior to its passage, unless its language be so clear as to admit of no other construction." *City Railway Company* v. *Citizens' Street Railroad Company*, 166 U.S. 557, 565 (1897).

In enacting the other three amendments to the Renegotiation Act, Congress took great care to spell out the effective dates of the various provisions.

The 1942 Renegotiation Act was first amended by the Act of October 21, 1942 (c. 619, Title VIII, § 801, 56 Stat. 982). Subsection (d) of this amendment provides:

> "The amendments made by this section shall be effective as of April 28, 1942."

The Renegotiation Act was amended for the third time by the Act of July 14, 1943 (c. 239, 57 Stat. 564).

Section 5 of this amendment provides:

> "The amendments made by this Act shall be effective as of April 28, 1942."

The fourth amendment to the Renegotiation Act was made on February 25, 1944, by chapter 63, Title VII, § 701, 58 Stat. 78, of which subsection (d) contains similar unmistakable language.

The United States Supreme Court, in determining whether an act of Congress was intended to have retro-

active effect, will compare the language of the act in question with that of other statutes *in pari materia* which are unmistakably retroactive.

See *Shwab* v. *Doyle*, 258 U.S. 529, 536 (1922).

By this test it is clear that Congress did not intend the July 1, 1943, amendment to apply to contracts on which payment had been made prior to July 1, 1943.

The 1942 Renegotiation Act of April 28, 1942, as amended October 21, 1942, provided in part in section 403(c) as follows:

> "This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, . . . unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942. . . ."

The respondent contends that by reading subsection (k) of the July 1, 1943, amendment together with the above-quoted provision of section 403(c), the July 1, 1943, amendment subjected to renegotiation contracts with Defense Plant Corporation which were fully completed and paid for prior to the enactment of the amendment.

The petitioner contends that the words "shall be construed to apply" in subsection (k) of the July 1, 1943, amendment are equivalent in effect to "shall be read, where applicable, to apply." Otherwise, if Congress had intended the July 1, 1943, amendment to be retroactive, subsection (k) need only have said "shall apply."

Previous to the July 1, 1943, amendment, the Renegotiation Act had provided in full the procedure to be followed in renegotiating all contracts affected by the act. The July 1, 1943, amendment sets forth no such procedure. Subsection (k) was obviously necessary to make appli-

cable to contracts and subcontracts with Defense Plant Corporation, which were not fully paid for on the date of enactment of the amendment, all of the provisions relating to the renegotiation process set forth in the original act and the amendment of October 21, 1942. That was the purpose of subsection (k). It does not, and should not, follow from this that subsection (k) made the Renegotiation Act applicable to contracts or subcontracts with Defense Plant Corporation which had not been completed and paid for prior to April 28, 1942, but rather subsection (k) made the provisions of the Renegotiation Act applicable to contracts with Defense Plant Corporation, provided final payment thereon had not been made prior to the date of the enactment of the amendment.

The Tax Court in the instant case admitted, over petitioner's objection and exception, certain evidence which had been introduced in the same court in *National Electric Welding Machines Co.* v. *Stimson*, 10 T.C. 49 (1948). This evidence consisted of (1) a letter dated June 24, 1943, from John D. Goodloe, General Counsel for the Reconstruction Finance Corporation to Senator Elbert Thomas, chairman of the War Department Subcommittee of the Senate Appropriation Committee (R. pp. 137, 105). The letter suggested that the wording which later appeared as subsection (k) of the July 1, 1943, amendment, be used if Congress should select April 28, 1942, as the date from which the Renegotiation Act would be effective as to uncompleted contracts with Reconstruction Finance Corporation subsidiaries. (2) Senator Thomas testified that he read the letter to the Joint Conference Committee of the House and Senate, of which he was chairman, and the Committee agreed to the amendment which became subsection (k) (R. pp. 106, 110).

Petitioner contends that, since this evidence was not embodied in any official documents such as the Congressional

Record, nor in the reports of the Joint Conference Committee nor of any other committee to the Congress which voted the amendment it should have been excluded and should not be considered in determining congressional intent.

Lapina v. *Williams,* 232 U.S. 78, 90 (1914).
United States v. *Trans-Missouri Freight Association,* 166 U.S. 290, 317, 318 (1897).
McCaughn v. *Hershey Chocolate Co.,* 283 U.S. 488, 494 (1931).
United States v. *Wrightwood Dairy Co.,* 315 U.S. 110, 125 (1942).

The admission of this particular evidence for the purpose of ascertaining congressional intent is discussed and severely criticized in 97 Univ. of Pa. L. Rev. 293 (note 1948).

Since the retroactive application of the July 1, 1943, amendment to petitioner's subcontracts with Defense Plant Corporation which had already been completed and paid for prior to said date would be unconstitutional in that it would deprive the petitioner of its property without just compensation and without due process of law (as will be argued *infra*), this Court should adopt that construction which will avoid a grave constitutional question by construing the July 1, 1943, amendment to be prospective and not retroactive in its application to petitioner's subcontracts.

United States v. *Delaware & Hudson Co.,* 213 U.S. 366, 407 (1909).
Crowell v. *Benson,* 285 U.S. 22, 62 (1932).
Cf. *Chicago* v *Fieldcrest Dairies, Inc.,* 316 U.S. 168, 173 (1942).

II. RETROACTIVE APPLICATION OF THE JULY 1, 1943, AMENDMENT TO THE PETITIONER'S SUBCONTRACTS WITH DEFENSE PLANT CORPORATION, WHICH WERE COMPLETED AND PAID FOR PRIOR TO JULY 1, 1943, WOULD BE UNCONSTITUTIONAL IN THAT IT WOULD VIOLATE THE FIFTH AMENDMENT.

Petitioner believes that the constitutionality of the July 1, 1943, amendment to the Renegotiation Act in its retroactive application to contracts fully performed and paid for prior to that date arises in this Court as an original question.

To the knowledge of the petitioner, the only opinion in which the United States Supreme Court has passed upon the constitutionality of the Renegotiation Act was in *Lichter* v. *United States*, 334 U.S. 742 (1948).

In that case this Court carefully confined its decision on constitutionality to the prospective operation of the Renegotiation Act. The Court said at page 789 that—

> "... *if uncompleted to the extent that the final payment has not yet been made*, the recovery of excessive profits derived from [a war contract] may be authorized as has been done here." (Italics supplied.)

In the case at bar petitioner's subcontracts with Defense Plant Corporation were *not executory but had been fully performed and paid for* prior to the enactment of the July 1, 1943, amendment, and *these payments had become petitioner's property.* The contracts themselves had ceased to exist long before July 1, 1943. They were no longer contracts in the ordinary sense. The proceeds which the petitioner had collected were by then completely severed from the past contracts and had become part of the petitioner's general property.

The attempted confiscation of petitioner's profits conflicts with the rule laid down by the Supreme Court in *Sinking-Fund Cases,* 99 U.S. 700, 720 (1878).

> "All agree that [the power of Congress] cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made, . . ."

Public opinion and the Courts alike have long viewed with disfavor the legislative divestment of previously vested property rights. Such retroactive legislation is harsh, liable to caprice and arbitrary abuse, and fundamentally unfair; and such legislation will be struck down by the Courts.

Ochoa v. *Hernandez y Morales,* 230 U.S. 139, 153-154 (1913).

Ettor v. *Tacoma,* 228 U.S. 148 (1913).

Stimson, Retroactive Application of Law—a Problem in Constitutional Law, 38 Mich. L. Rev. 30, 37-38 (1939).

In *Lynch* v. *United States,* 292 U.S. 571, 576, 579, 580 (1934), the government contended that certain War Risk Insurance claims had been "repealed" by the Economy Act of March 20, 1933. Mr. Justice Brandeis wrote the opinion of a unanimous Court, rebuking such a breach of official faith:

> "But the policies, although not entered into for gain, are legal obligations of the same dignity as other contracts of the United States and possess the same legal incidents." (P. 576.)

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid

contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States* v. *Central Pacific R. Co.*, 118 U.S. 235, 238; *United States* v. *Northern Pacific Ry. Co.*, 256 U.S. 51, 64, 67. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power." (P. 579.)

"But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation." (P. 580.)

In the above-cited cases the rights involved, although vested, nevertheless had not been fully realized to the extent of being reduced to possession and enjoyment. Something more remained to be done. By contrast, in the case at bar the petitioner's rights not only had vested, but had been reduced to property and commingled with its other property. Nothing further remained to be done. It therefore follows that the petitioner's property is entitled to at least the protection that was afforded the rights involved in the above-cited cases.

The Court of Appeals, in holding constitutional the retroactive application of the July 1, 1943, amendment to petitioner's contracts, relied upon *Howell Electric Motors Co.* v. *United States,* 172 F. (2d) 953 (1949). In that case the Court of Appeals for the Sixth Circuit did hold that the July 1, 1943, amendment was constitutional as retroactively applied to contracts completed and paid for prior to its enactment but subsequently to April 28, 1942. The contractor had conceded that Congress intended the act, as amended, to apply retroactively. The United States Supreme Court cases cited on the point in the Howell case were *Louisville & Nashville R.R. Co.* v. *Mottley,* 219 U.S. 467 (1911), which is distinguishable because the payments called for by the contract in question had not been completed upon the date of the statutory enactment; and *Welch* v. *Henry,* 305 U.S. 134 (1938), and *United States* v. *Hudson,* 299 U.S. 498 (1937), both of which cases involved tax legislation.

This Court has held retroactive application of income tax statutes for relatively short periods of time to be constitutional because, at least where an income tax is already in effect, Congress has power to impose an increased or additional tax if satisfied there is need therefor.

United States v. *Hudson, supra,* at page 500.

But the constitutional rule against retroactive application of statutes is not entirely suspended for income taxes; it is but slightly relaxed.

The limit of federal income tax retroactivity ever permitted by the United States Supreme Court is the receipt of income in the same year that the taxing statute was enacted.

Cooper v. *United States,* 280 U.S. 409 (1930).

When income is received by any person within a jurisdiction in which the taxation of income has been authorized by law, the tax is already fixed in obligation though not in amount. Nothing remains to be done to complete the recipient's duty to pay the tax except the determination of its amount. All that the taxing statute does, therefore, is to fix the amount of a tax already due. Under such circumstances, it appears, even statutes imposing taxes on transactions, and not income tax statutes alone, may vary the amount of tax liabilities previously incurred.

In such cases the taxpayer is forewarned that the rate of tax of the tax statute already in effect may be increased.

Milliken v. *United States,* 283 U.S. 15 (1931).

But a tax on transfers made prior to the date of the taxing statute itself has been held invalid as repugnant to the due process clause of the Fifth Amendment.

Nichols v. *Coolidge,* 274 U.S. 531 (1927) (estate tax).

Blodgett v. *Holden,* 275 U.S. 142 (1927) (gift tax).

Untermyer v. *Anderson,* 276 U.S. 440 (1928) (gift tax).

Levy v. *Wardell,* 258 U.S. 542 (1922) (stock transfer tax).

The petitioner submits that it was not forewarned, or warned at all, of the attempted recapture of the proceeds which it had received under the contracts here involved. It could have foreseen neither the nature nor the amount of, nor could it have avoided, such confiscation.

Furthermore, petitioner submits that the enactment of the Renegotiation Act was not an exercise by Congress of its taxing power.

Congress specifically rejected proposals to authorize renegotiation by means of a taxing statute (see, for example, remarks of Senator Taft, 88th Cong. Rec. 3660, and 89th Cong. Rec. 6081), preferring the method of renegotiation exemplified by the 1942 Act. Moreover, the departments charged with administration of the 1942 Renegotiation Act did not interpret it as a taxing statute. On the contrary, section 3 of the Joint Statement issued by the War, Navy and Treasury Departments and the Maritime Commission on March 31, 1943, is entitled: "Section 403 is not a tax act . . . ," and begins with the following statement:

> "Section 403 has been occasionally but inaccurately interpreted as a tax act."

Admitting that Congress in the exercise of its war powers may impair the obligation of contracts, it nevertheless cannot take property which has been reduced to possession, without just compensation and without due process of law. Thus, since petitioner's subcontracts with Defense Plant Corporation had been completed and paid for prior to enactment of the July 1, 1943, amendment, and since such payments had been reduced to possession and had become a part of petitioner's general property prior to said date, petitioner submits that the retroactive application of said amendment to confiscate such payments would be unconstitutional as a violation of the Fifth Amendment.

III. THE RESPONDENT DID NOT COMMENCE RENEGOTIATION OF PETITIONER'S SUBCONTRACTS WITH DEFENSE PLANT CORPORATION WHICH WERE COMPLETED AND PAID FOR DURING ITS FISCAL YEAR ENDED NOVEMBER 30, 1942, WITHIN THE TIME ALLOWED BY SECTION 403(c)(6) OF THE 1942 RENEGOTIATION ACT AS AMENDED OCTOBER 21, 1942.

The 1942 Renegotiation Act as originally enacted contained no limitation on the time within which renegotiation should be commenced. By the amendment of October 21, 1942 (c. 619, Title VIII, § 801, 56 Stat. 982), the Renegotiation Act was amended to provide for two limitations on the time within which renegotiation could be commenced. One limitation is contained in what is now subsection (6) of section 403(c). This subsection (6) is applicable to the case at bar, and its pertinent provisions are as follows:

> "No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs."

Under this subsection (6), respondent was barred from commencing renegotiation after November 30, 1943, of subcontracts of petitioner with Defense Plant Corporation which were completed and paid for prior to November 30, 1942, the close of petitioner's 1942 fiscal year. Such subcontracts amounted to $1,661,803.78 (R. p. 81).

Subsection (6) does not declare the meaning to be given to the words "renegotiation commenced"; but subsection (5) of section 403(c) sets forth a second limitation of time, which sheds light upon the meaning of these two words.

Section 403(c)(5) provides:

> "Any contractor or subcontractor who holds contracts or subcontracts, to which the provisions of this section are applicable, may file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation. Within one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regulation, the Secretary of a Department may give the contractor or subcontractor written notice, in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. *If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafter be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged.*" (Italics supplied.)

A study of the pertinent legislative history discloses that the actual wording of subsection (5) and subsection (6) as they were finally approved was the same in all drafts. Neither in committees nor on the floor of Congress was the meaning of these sections discussed. Therefore this Court

must look to the act itself to ascertain the intent of Congress.

Nowhere in the legislative history of subsections (5) and (6), nor in the language of these subsections, is there to be found any distinction in meaning to be given "renegotiation commenced" as used in the two subsections; and as was said in *J. H. Sessions & Son* v. *Secretary of War*, 6 T.C. 1236, 1240 (1946), of these two subsections:

> "If the legislators had in mind the distinction which the respondent makes, it seems only reasonable to expect that somewhere in the legislative history or in the provisions themselves some attention would have been focused upon it."

Both subsections (5) and (6) were enacted at the same time on October 21, 1942. Under subsection (5) it would seem clear that renegotiation is not commenced with the filing of financial information by the contractor, by the self-serving statement of the Secretary or his representatives that renegotiation is officially opened or started, by written notice that the Secretary is of the opinion that excessive profits may have been realized by the contractor, nor even by the fixing of a date and place by the Secretary for initial conference with the contractor. It is apparent that even after the Secretary has given notice that he is of the opinion that excessive profits may have been realized and after he has set a date and place for the initial conference with the contractor, something more must take place to constitute a commencement of renegotiation. As the Court said in *Spaulding* v. *Douglas Aircraft Co.*, 154 F. (2d) 419, 426 (C.C.A. 9th, 1946), "The word 'renegotiation' implies a hearing."

Accordingly, petitioner contends that respondent's letters of October 25, 1943, and November 23, 1943, and the

informal conference between petitioner and respondent's representatives on November 18, 1943, constituted no more than requests for information as to petitioner's profits and self-serving declarations by respondent that petitioner's subcontracts with Defense Plant Corporation were subject to renegotiation and that renegotiation had been started. Prior to November 30, 1943, respondent had formed no opinion that petitioner may have received excessive profits on said subcontracts, nor was any date set for a formal, initial conference with petitioner before November 30, 1943.

The Court of Appeals on this point, without opinion, reached the same conclusion as the Tax Court. The Tax Court, in ruling that renegotiation had been commenced prior to November 30, 1943, relied solely on its decision in *Spray Cotton Mills* v. *Secretary of War,* 9 T.C. 824 (1947), in which a majority of the Court construed "renegotiation commenced" to mean the taking of "the first step or act which set the machinery of renegotiation in motion," such as the mailing of a letter requesting financial information from the contractor. It is to be noted, however, that three judges of the Tax Court dissented in the Spray Cotton Mills case, and Arundell, J., with Van Fossan, J., concurring, wrote a dissenting opinion which supports the petitioner's contention in this case.

"Renegotiation commenced" means something different from "renegotiation proceedings," as section 403(c)(5) clearly indicates.

Thus, since the events taking place prior to November 30, 1943, did not constitute "renegotiation commenced" within the definition contained in section 403(c)(5) of the Renegotiation Act as amended, and since the words "renegotiation commenced" contained in section 403(c)(6), applicable to the case at bar, must be construed to have the same meaning as used in section 403(c)(5), petitioner con-

tends that the respondent did not commence renegotiation within the statutory time limit, as to contracts of petitioner, completed and paid for prior to November 30, 1942.

Conclusion.

Wherefore petitioner respectfully submits that a writ of certiorari in this case should be granted for the reason that the Court of Appeals has erred in deciding questions of substance relating to the construction and application of the Fifth Amendment to the Constitution and the Renegotiation Act as amended, and for the further reason, as set forth in the petition, that these questions are of general and far-reaching importance and ought to be settled by this Court.

FRANK B. WALLIS,
Attorney for BLANCHARD MACHINE COMPANY, *Petitioner*,
84 State Street,
Boston 9, Massachusetts.

Of Counsel:
GOODWIN, PROCTER & HOAR,
HARRIS A. REYNOLDS,
84 State Street
Boston 9, Massachusetts.

APPENDIX A.

Pertinent Provisions of Statutes Involved.

1942 Renegotiation Act—Act of Apr. 28, 1942, c. 247, Title IV, s. 403 (c) (d) (e), 56 Stat. 245:

"(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor. Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, and such Secretary may bring actions in the appropriate courts of the United States to recover such amount on behalf of the United States. All amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act.

"(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Sec-

retaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

"(e) In addition to the powers conferred by existing law, the Secretary of each Department shall have the right to demand of any contractor who holds contracts with respect to which the provisions of this section are applicable in an aggregate amount in excess of $100,000, statements of actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. Any person who willfully fails or refuses to furnish any statement required of him under this subsection, or who knowingly furnishes any such statement containing information which is false or misleading in any material respect, shall, upon conviction thereof, be

punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both. The powers conferred by this subsection shall be exercised in the case of any contractor by the Secretary of the Department holding the largest amount of such contracts with such contractor, or by such Secretary as may be mutually agreed to by the Secretaries concerned."

1942 Renegotiation Act as amended by Act of Oct. 21, 1942, c. 619, Title VIII, s. 801 (a), 56 Stat. 982:

"Sec. 403 (a) For the purposes of this section—

"(1) The term 'Department' means the War Department, the Navy Department, the Treasury Department, and the Maritime Commission, respectively.

"(2) In the case of the Maritime Commission, the term 'Secretary' means the Chairman of such Commission.

"(3) The terms 'renegotiate' and 'renegotiation' include the refixing by the Secretary of the Department of the contract price.

"(4) The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

"(5) The term 'subcontract' means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term 'article' includes any material, part, assembly, machinery, equipment, or other personal property.

"For the purposes of subsections (d) and (e) of this section, the term 'contract' includes a subcontract and the term 'contractor' includes a subcontractor.

. . . . . .

"(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized

from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits in some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

. . . . . .

"(5) Any contractor or subcontractor who holds contracts or subcontracts, to which the provisions of this section are applicable, may file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation. Within one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regulation, the Secretary of a Department may give the contractor or subcontractor written notice, in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafter be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged.

. . . . . .

"(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942, or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403, or (iii) the aggregate sales by the contractor or subcontractor, and by all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder do not exceed, or in the opinion of the Secretary concerned will not exceed, $100,000 for the fiscal year of such contractor or subcontractor.

"No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs."

Act of Oct. 21, 1942, c. 619, Title VIII, s. 801 (d), 56 Stat. 985:

"(d) The amendments made by this section shall be effective as of April 28, 1942."

1942 Renegotiation Act as amended by Military Appropriations Act of 1944, Act of July 1, 1943, c. 185, 57 Stat. 348:

"Sec. 403 (a) For the purposes of this section—

"1. The term 'Department' means the War Department, the Navy Department, the Treasury Department,

the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

"2. In the case of the Maritime Commission, the term 'Secretary' means the Chairman of such Commission, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term 'Secretary' means the board of directors of the appropriate corporation."

"(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company."

Act of July 14, 1943, c. 239, s. 5, 57 Stat. 565:

"The amendments made by this Act shall be effective as of April 28, 1942."

1942 Renegotiation Act as amended by Act of Feb. 25, 1944, c. 63, Title VII, s. 701 (b), 58 Stat. 82 (U.S.C. Title 50, App. s. 1191):

"403 (c) (1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. At the conference, which may be adjourned from time to time, the Board shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other

matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal year (or such other period as may be fixed by mutual agreement) by a contractor or subcontractor under contracts with the Departments and subcontracts, and not separately with respect to amounts received or accrued under separate contracts with the Departments or subcontracts, except that the Board may exercise such powers separately with respect to amounts received or accrued by the contractor or subcontractor under any one or more separate contracts with the Departments or subcontracts at the request of the contractor or subcontractor. Whenever the Board makes a determination with respect to the amount of excessive profits, whether such determination is made by order or is embodied in an agreement with the contractor or subcontractor, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination. Such statement shall

not be used in The Tax Court of the United States as proof of the facts or conclusions stated therein."

Act of Feb. 25, 1944, c. 63, Title VII, s. 701 (d), 58 Stat. 92:

"Effective date. The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, except that (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3), and (1) in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, shall be effective as if such amendments and subsections had been a part of section 403 of such Act on the date of its enactment, and (2) the amendments adding subsection (d) and (e) (2) to section 403 of such Act shall be effective from the date of the enactment of this Act."

APPENDIX B.

Authorities as to Retroactivity.

A. Statutes Affecting "Vested Rights."

Reynolds v. *M'Arthur*, 2 Pet. 417, 434 (1829), per Marshall, C.J.:

> "The language of the law is entirely prospective. It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated look forwards, not backwards; and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable. No words are found in the act of 1818, which render this odious construction indispensable."

Union Pacific R.R. Co. v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913):

> "The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' *United States* v. *Heth*, 3 Cranch, 399, 413; *Reynolds* v. *McArthur*, 2 Pet. 417; *United States* v. *American Sugar Refining Co.*, 202 U.S. 563, 577; *Winfree, Admr.*, v. *Northern Pac. Railway Co.*, 227 U.S. 296. Surely such imperative character cannot be assigned to the words of the act of June 24; and the intention is not so manifest as to strengthen the insufficiency of the words. Indeed, all reasonable considerations determine the other way."

B. Statutes Affecting Contract Rights.

Southwestern Coal Co. v. *McBride*, 185 U.S. 499, 503 (1902):

> "The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While, in the absence of a constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed; and, assuming the legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation. If Congress had intended to deprive lessors of the royalties due and owing to them at the date of the act it would have used appropriate language to express that intention, and would necessarily have made some provision for the disposition of such royalties."

C. Statutes Creating New Causes of Action or Affecting Statutes of Limitations.

Winfree v. *Northern Pacific Railway Co.*, 227 U.S. 296, 301-302 (1913):

> "It is hardly necessary to say that such statutes are exceptions to the almost universal rule that statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men and should not be held to affect what has happened unless, indeed, explicit words be used or by clear implication that construction be required. It is true that it is said that there was liability on the part of the defendant for its negligence before the passage of the act of Congress and the act has only given a

more efficient and a more complete remedy. It, however, takes away material defenses, defenses which did something more than resist the remedy; they disproved the right of action. Such defenses the statute takes away, and that none may exist in the present case is immaterial. It is the operation of the statute which determines its character."

Miller v. *United States,* 294 U.S. 435, 439 (1935):

"The law is well settled that generally a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears."

D. Tariff and Taxing Statutes.

Shwab v. *Doyle,* 258 U.S. 529, 534-535 (1922):

"The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent. 455; *Eidman* v. *Martinez,* 184 U. S. 578; *White* v. *United States,* 191 U. S. 545; *Gould* v. *Gould,* 245 U. S. 151; Story, Const., § 1398. The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'

. . . . . .

"There is certainly in it no declaration of retroactivity, 'clear, strong and imperative', which is the condition expressed in *United States* v. *Heth,* 3 Cranch, 398, 413; also *United States* v. *Burr,* 159 U. S. 78, 82-83.

"If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases, that that which rejects retroactive operation must be selected."

Lewellyn v. *Frick*, 268 U.S. 238, 251-252 (1925):

"Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind. *Panama R. R. Co.* v. *Johnson*, 264 U.S. 375, 390. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that the laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."